

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, and )  
THE STATE OF NEBRASKA )

Plaintiffs )

v. )

THE CITY OF MCCOOK, NEBRASKA )  
A Municipal Corporation )

Defendant. )

CIVIL ACTION NO. \_\_\_\_\_

**COMPLAINT**

The United States of America ("United States"), by authority of the Attorney General of the United States and through undersigned counsel, acting at the request and on behalf of the United States Environmental Protection Agency ("EPA"), and the State of Nebraska ("State"), by authority of the Attorney General of the State of Nebraska and on behalf of the Nebraska Department of Environmental Quality (NDEQ) and the Nebraska Department of Health and Human Services Regulation and Licensure (HHSR&L), through undersigned counsel, file this Complaint and allege as follows:

**NATURE OF ACTION**

1. This is a civil action for injunctive relief and civil penalties brought against the City of McCook, Nebraska ("McCook," "City" or "Defendant") for numerous violations of federal and state environmental laws by failing to comply with Section 301 of the

Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 ("CWA"), 33 U.S.C. § 1311; by failing to comply with a permit issued under section 402 of the CWA, 33 U.S.C. § 1342; and by failing to comply with Section 1411 of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300g and by failing to comply with regulations issued pursuant to Section 1412 of the SDWA, 42 U.S.C. § 300g-1.

2. The State also institutes this action against Defendant for failing to comply with the Nebraska Environmental Protection Act ("NEPA"), Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 1999, Com. Supp. 2002 and Supp. 2003) and regulations promulgated thereunder, for failing to comply with Administrative Orders issued by NDEQ requiring the City to comply with its National Pollutant Discharge Elimination System permit ("NPDES permit" or "Permit"); and for failing to comply with the Nebraska Safe Drinking Water Act ("NSDWA"), Neb. Rev. Stat. § 71-5301 (reissue 2003) *et seq.*, and regulations promulgated thereunder, and by failing to comply with the requirements for operation of its Public Water Supply System ("PWSS") and by failing to comply with an Administrative Order issued by HHSR&L to provide drinking water to its service population in compliance with PWS requirements.

3. The United States and the State seek injunctive relief and the assessment of civil penalties against Defendant for violations of the CWA and regulations promulgated thereunder, for violations of the SDWA and regulations promulgated thereunder, for violations of the terms of the NPDES permit issued to the City pursuant to Section 402 of the CWA, and for violations of the NEPA and the NSDWA. These

violations include violations of the NPDES permit effluent limitations for ammonia during the summer seasonal months in the City's Publicly Owned Treatment Works ("POTW"), which discharges to the Republican River, and violations of the maximum contaminant level ("MCL") for nitrates and uranium in the City's PWS such that bottled water has become mandatory for sensitive populations including infants and pregnant and nursing women.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355; Sections 309(b) and 309(d) of the CWA, 33 U.S.C. §§ 1319(b) and 1319(d); and Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b).

5. Authority to bring this action on behalf of the United States is vested in the United States Department of Justice by 28 U.S.C. §§ 516, 519, and by Section 506 of the CWA, 33 U.S.C. § 1366, and by Section 1450(f) of the SDWA, 42 U.S.C. §300j-9(f).

6. The Attorney General for the State of Nebraska brings this action on behalf of NDEQ which is charged with the duty pursuant to Neb. Rev. Stat. § 81-1504(1) (Reissue 1999) of exercising exclusive supervision, administration and enforcement of the NEPA, Neb. Rev. Stat. § 81-1501 *et seq.* (Reissue 1999, Cum. Supp. 2002, and Cum. Supp. 2003) *et seq.*, and rules and regulations promulgated thereunder and codified at Title 119 of the Nebraska Administrative Code ("NAC"), *Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System*, and Title 123 of NAC, *Rules and Regulations*

*for the Design, Operation and Maintenance of Waste Water Treatment Facilities.*

7. The Attorney General for the State of Nebraska also brings this action on behalf of HHSR&L which is charged with the duty pursuant to Neb. Rev. Stat. § 71-5304.01 of exercising exclusive supervision, administration and enforcement of the NSDWA, Neb. Rev. Stat. § 71-5301 through 71-5313 (Reissue 2003), and rules and regulations promulgated thereunder at Title 179 of NAC, Chapter 2, *Regulations Governing Public Water Supply Systems.*

8. Notice of the commencement of this action has been given to the State pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and Section 1414(a) of the SDWA, 33 U.S.C. §300g-3(a).

9. Section 309(e) of the CWA, 33 U.S.C. §1319(e), requires that the State be joined as a party to this action.

10. The Director of HHSR&L has requested that the United States initiate a civil action pursuant to Section 1414(b)(2) of the SDWA, 42 U.S.C. § 300g-1(b)(2).

11. Venue lies in the District of Nebraska pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), 28 U.S.C. §§ 1391(b) and 1395(a), and Section 1414(g)(3)(c) of the SDWA, 42 U.S.C. §300g-3(g)(3)(C), because Defendant resides and is located in this judicial district and the violations alleged in this Complaint are alleged to have occurred in this judicial district.

#### **DEFENDANT**

12. Defendant McCook is a municipal corporation organized under the laws of the State of Nebraska and a "municipality" within the meaning of Section 502(4) of the

CWA, 33 U.S.C. § 1362(4).

13. McCook is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), Section 1401(12) of the SDWA, 42 U.S.C. § 300(f)(12), and Neb. Rev. Stat. §§ 71-5301(7) and 81-1502(10).

14. McCook owns and operates a wastewater treatment facility ("WWTF") that is a POTW, as that term is defined at 40 C.F.R. § 122.2 and 119 NAC 1-050.

15. McCook also owns and operates a PWS as that term is defined in Section 1401(4) of the SDWA, 42 U.S.C. § 300(f)(4), and regulations at 40 C.F.R. § 141.2. The PWS is also a public water supply system as that term is defined at Neb. Rev. State. 71-5301(9), and regulations at 179 NAC 2-001.02. The PWS utilizes groundwater as its source water.

## **STATUTORY BACKGROUND**

### **Clean Water Act**

16. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and implementing regulations, prohibit the discharge of pollutants into navigable waters of the United States by any person, except as in compliance with, *inter alia*, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

17. Under Section 402(a) of the CWA, 33 U.S.C. § 1342(a), the Administrator of EPA may issue NPDES permits that authorize the discharge of pollutants into navigable waters of the United States, subject to the conditions and limitations set forth in such permits.

18. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that a state

may establish its own NPDES permit program and, after receiving approval of its program by the EPA Administrator, may issue permits. The state of Nebraska administers the NPDES permit pursuant to this authority.

19. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator of EPA to commence a civil action for appropriate relief when any person violates, *inter alia*, Section 301 of the CWA, 33 U.S.C. § 1311, or a condition or limitation contained in an NPDES permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

20. EPA retains concurrent enforcement authority with authorized state NPDES programs under Sections 309 and 402(i) of the CWA, 33 U.S.C. §§ 1319 and 1342(i).

21. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates various sections of the CWA, including Section 301, 33 U.S.C. §1311, or any permit condition or limitation implementing Section 301 in a permit issued under Section 402, 33 U.S.C. §1342, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. Under 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation, and pursuant to 28 U.S.C. § 2461, the civil penalty amount was raised to \$27,500 per day for each violation occurring after January 30, 1997, and to \$32,500 per day per violation for any violation occurring after March 15, 2004. (See 69 Fed. Reg. 7121, February 13, 2004.)

22. Neb. Rev. State. § 81-1506(1)(a) states that it is unlawful for any person to cause pollution of any air, waters or land of the state or place or cause to be placed

any wastes in locations where they are likely to cause pollution of any air, waters or land.

23. Neb. Rev. Stat. § 81-1506(2)(c) states that it is unlawful for any person to increase in volume or strength any waste in excess of permitted discharges specified under any existing permit.

24. Neb. Rev. Stat. § 81-1508.02(1)(b) (Reissue 1999) makes it unlawful for any person to violate, *inter alia*, any water effluent standards or limitations, any permit condition or limitation, or any order of the director of NDEQ issued pursuant to NEPA or the rules or regulations adopted and promulgated pursuant to NEPA.

25. Pursuant to Neb. Rev. Stat. § 81-1508.02(2) (Reissue 1999), each violation of Neb. Rev. Stat. §§ 81-1506 or 81-1508.02 shall subject a person to a civil penalty of no more than \$10,000 for each day of violation.

### **Safe Drinking Water Act**

26. Section 1412 of the SDWA, 42 U.S.C. § 300g-1, provides for the adoption of "national primary drinking water regulations," as defined by Section 1401(1) of the SDWA, 42 U.S.C. § 300f(1), which have been promulgated at 40 C.F.R. Part 141.

27. The national primary drinking water regulations govern the contaminant limitations (including MCLs), monitoring requirements, public notification requirements and other requirements for regulated drinking water systems.

28. Section 1411 of the SDWA, 42 U.S.C. § 300g, subjects each PWS to the national primary drinking water regulations.

29. A PWS is a system for the provision to the public of piped water for

human consumption, if such system has at least 15 service connections or regularly services at least twenty-five individuals. 42 U.S.C. § 300f(4), 40 C.F.R. § 141.2, Neb. Rev. Stat. § 71-5301(9), and 179 NAC 2-001.02.

30. Pursuant to Section 1413 of the SDWA, 42 U.S.C. § 300g-2, a state may request, and the Administrator may approve, primary enforcement responsibility for public water systems within the state upon a determination by EPA that the state has adopted drinking water standards no less stringent than the national standards, and has adopted other related program enforcement requirements consistent with the requirements of Section 1413(a) of the SDWA.

31. Section 1414(i) of the SDWA, 42 U.S.C. § 300g-3(i), identifies the national primary drinking water regulations and requirements of an approved state PWS program as “applicable requirements” for purposes of Section 1414 of the SDWA.

32. Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), provides authorization for EPA to commence a civil action to require compliance with any applicable requirement of the SDWA, and to seek injunctive relief and penalties for violations of such applicable requirements.

33. Pursuant to Section 1414(b)(2) of the SDWA, 42 U.S.C. § 300g-3(b)(2), the Director of HHSR&L has requested that EPA join the state in a civil judicial action.

34. Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), provides that the Court may impose on the violator a civil penalty not to exceed \$25,000 for each day in which such violation occurs. Under 40 C.F.R. Part 19, Adjustment of Civil Monetary Penalties for Inflation, and pursuant to 28 U.S.C. § 2461, the civil penalty amount was

raised to \$27,500 per day for each day in which such violation occurred after January 30, 1997, and to \$32,500 per day for each day in which such violation occurred after March 15, 2004. (See 69 Fed. Reg. 7121, February 13, 2004.)

35. Pursuant to Neb. Rev. Stat. § 71-5304.01(1), if the Director of HHSR&L has reason to believe that a violation of the NSDWA or any rule or regulation adopted and promulgated thereunder has occurred, he may issue an order requiring that necessary corrective action be taken within a reasonable time.

36. Neb. Rev. Stat. § 71-5304.01(4) and (5), further authorize the director of HHSR&L to assess a penalty upon a PWS violator serving fewer than 10,000 persons of no more than \$500 per day for each violation, not to exceed \$5,000 in the aggregate.

**GENERAL ALLEGATIONS**  
**Clean Water Act**

37. EPA approved the State's NPDES permit program under the authority of Section 402(b) of the CWA, 33 U.S.C. § 1342(b), on June 12, 1974.

38. The City's POTW is a mechanical treatment plant located within NE 1/4 NW 1/4, Section 33, Township 3 North, Range 29 West, Red Willow County, McCook, Nebraska.

39. The POTW discharges to section RE3-1000 of the Republican River.

40. The Republican River is a "navigable water" and a "water of the United States" under Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and a "water of the state" within the meaning of Neb. Rev. Stat. § 81-1502(21).

41. The Republican River has water quality use designations for aquatic life-

warmwater A, recreation, agriculture water supply A, and aesthetics.

42. This segment of the Republican River has site-specific water quality criteria for ammonia, found at 117 NAC 4-003.02B2, and has been included in the 2002 Nebraska CWA Section 303(d) List under Part Four: impaired Solely by Point Source Discharges.

43. The listing of section RE3-1000 of the Republican River pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(c), documents that the impaired use is aquatic life and that the pollutant of concern is ammonia.

44. Pursuant to the authority of Section 402 of the CWA, 33 U.S.C. § 1342, and the NEPA, the State issued NPDES Permit number NE0021504 to the City, effective on December 4, 1998, and expiring on October 31, 2003.

45. The City filed a timely NPDES permit application, and pursuant to State law, the NPDES permit was administratively extended.

46. The City's 1998 NPDES permit set both concentration and mass limitations for ammonia and identified both summer and winter seasonal limits.

47. The City's 1998 NPDES permit contained summer season (April 1 through October 31) limitations for ammonia as follows: daily maximum concentration-based limits of 2.98 milligrams per liter (mg/L) and 30-day average concentration-based limits of 1.82 mg/L; and daily maximum mass-based limits of 11.99 kilograms per day (kgd) and 30-day average mass-based limits of 7.31 kgd.

48. The State recently reissued NPDES Permit no. NE0021504 to the City, effective February 1, 2005, containing more stringent (lower) concentration and mass

limitations for ammonia from June 1 through October 31.

### **Safe Drinking Water Act**

49. The City is a "supplier of water" as defined in Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5), in that it owns and operates a PWS.

50. The City's PWS serves a population of approximately 8,000 consumers.

51. The City's PWS is a "community water system" as defined by 40 C.F.R. § 141.2 and 179 NAC 2-001.02.

52. The City's PWS uses groundwater as its source water.

53. The City is required to comply with national primary drinking water regulations codified in 40 C.F.R. Part 141 and in Title 179 NAC.

54. The MCL for nitrates in a PWS is 10 milligrams per liter (mg/L) as nitrogen. 40 C.F.R. § 141.62; 179 NAC 2-002.02A.

55. The nitrate MCL, now codified under 40 C.F.R. § 141.62, was initially promulgated in 1975.

56. A community PWS using groundwater that has exceeded the MCL for nitrate by 50 percent or greater (i.e., 15 mg/L or greater) is required by 40 C.F.R. § 141.23(d)(2) to sample quarterly to determine compliance with the MCL for nitrates.

57. Under Nebraska law, a community PWS using groundwater is required to initiate quarterly sampling if the concentration of nitrate is 5 mg/L or greater. 179 NAC 3-005.04B.

58. The MCL for uranium in a PWS is an annual average of 30 micrograms per liter ( $\mu\text{g/L}$ ), based on the results of four quarterly samples. 40 C.F.R. §§

141.26(a) and 141.66(e); 179 NAC 2-002.02D4.

59. The uranium MCL became effective for the City's PWS on December 8, 2003, with compliance being determined after four quarters of sampling. 40 C.F.R.

§§ 141.26(a) and 141.66(f); 179 NAC 3-008.02C3a.

**FIRST CLAIM FOR RELIEF**  
**(Clean Water Act Violations)**

60. The allegations in the foregoing Paragraphs are incorporated herein by reference.

61. During all relevant times here, the City's NPDES permit has required compliance with daily maximum and 30-day average summer season effluent limitations for ammonia, measured as both concentration and mass.

62. Over the past five years and before, the City has discharged pollutants from its POTW in violation of the daily maximum and/or 30-day average summer season effluent limitations for ammonia, as measured in both concentration and mass.

63. The City is therefore in violation of its NPDES permit, Section 301 of the CWA, 33 U.S.C. § 1311, and Neb. Rev. Stat. §§ 81-1506 and 81-1508.02.

**SECOND CLAIM FOR RELIEF**  
**(Safe Drinking Water Act Violations)**

64. The allegations in the foregoing Paragraphs are incorporated herein by reference.

65. During all relevant times here, the City was required to comply with an MCL for nitrate of 10 mg/L as nitrogen.

66. On August 17, 1998, citing numerous violations of the MCL for nitrate,

HHSR&L issued an administrative order to the City of McCook under the authority of Neb. Rev. Stat. § 71-5304.01 requiring the City to, among other requirements, provide an alternate source of safe drinking water to certain sensitive populations, provide public notice of the nitrate violations, continue quarterly monitoring for compliance with the nitrate MCL, and find and implement a remedy for returning to compliance with the nitrate MCL.

67. The City has failed to comply with the requirements of the administrative order issued by HHSR&L, particularly with regard to implementing a remedy for returning into compliance with the nitrate MCL.

68. The City was required to comply with an MCL for uranium of 30 µg/L during the period from December 8, 2003, through December 8, 2004.

69. Quarterly samples taken by the City between December 8, 2003, and December 8, 2004, indicate that the City has failed to comply with the MCL for uranium.

70. Violations of 40 C.F.R. §§ 141.62 and 141.66 are violations of the national primary drinking water regulations and the SDWA.

71. The City is therefore in violation of Sections 1411 and 1412 of the SDWA, 42 U.S.C. §§ 300g and 300g-1, and Neb. Rev. Stat. § 71-5304.01.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that the Court:

72. Pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and Neb. Rev. Stat. § 81-1508.02, enjoin the City of McCook from any and all ongoing and future violations of the CWA and the NEPA, by ordering compliance with the CWA and the

NEPA, and regulations promulgated under each statute, and with the NPDES Permit.

73. Pursuant to Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), enjoin the City of McCook from any and all ongoing and future violations of the SDWA and the NSDWA, by ordering compliance with the SDWA, the NSDWA, and national primary drinking water regulations.

74. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), and Neb. Rev. Stat. §§ 71-5304.01 and 81-1508.02, assess civil penalties against McCook as permitted by law, up to the date of judgment herein.

75. Award such other and further relief as the Court may deem just and proper.

The United States of America hereby requests that trial of the above and foregoing action should be held in Omaha, Nebraska, and that the case be calendared accordingly.

Respectfully submitted,

THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division

---

COURTNEY E. INGRAFFIA  
Trial Attorney  
D.C. Bar No. 456364  
Environmental Enforcement Section  
Environmental and Natural Resources Division  
United States Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044

MICHAEL G. HEAVICAN  
United States Attorney  
District of Nebraska

By:

---

LAURIE KELLY, Mass. Bar No. 557575  
Assistant United States Attorney  
District of Nebraska  
1620 Dodge Street, Suite 1400  
Omaha, NE 68102-1506

JOHN BRUNING  
Attorney General

By:

---

Jodi M. Fenner, NE Bar No. 22038  
Assistant Attorney General  
Chief, Agriculture, Natural Resources & Environment  
Section  
2115 State Capitol Building  
Lincoln, Nebraska 68509-8920

---

Justin D. Lavene, NE Bar No. 22178  
Assistant Attorney General  
Agriculture, Natural Resources & Environment  
Section  
2115 State Capitol Building  
Lincoln, Nebraska 68509-8920